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In the Supreme Court of the United States

OCTOBER TERM, 1970

70-161

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

RADIE WRIGHT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

ERWIN N. GRISWOLD,
Solicitor General,
L. PATRICK GRAY, III,
Assistant Attorney General,
KATHRYN H. BALDWIN,
PATRICIA S. BAPTISTE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

WILMOT R. HASTINGS,
General Counsel,
EDWIN H. YOURMAN,
Assistant General Counsel,
PAUL MERLIN,
Attorney,
Department of Health, Education, and Welfare,
Washington, D.C. 20201

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OPINION BELOW

The opinion of the district court (App. A 15–23) is reported at 321 F. Supp. 383.

JURISDICTION

The order of the district court declaring 42 U.S.C. 425 unconstitutional was entered on February 12, 1971 (App. B 24–25). A notice of appeal was filed on March 12, 1971 (App. C 26). The jurisdiction of this Court is conferred by 28 U.S.C. 1253.

QUESTION PRESENTED

Whether Section 225 of the Social Security Act, under which disability benefit payments are suspended

on the basis of objective evidence but without a hearing, is constitutional.

STATUTES AND REGULATIONS INVOLVED

Section 225 of the Social Security Act, 79 Stat. 373, as amended, 42 U.S.C. (Supp. V) 425, and the relevant Department of Health, Education and Welfare regulations, are set forth in Appendix D, *infra* 27–29.

STATEMENT

Appellee Radie Wright is a social security disability beneficiary who had his benefit payments suspended under Section 225 of the Social Security Act, 42 U.S.C. (Supp. V) 425, because he had returned to work and had engaged in substantial gainful employment, thus rendering him ineligible for further benefits.[1] He instituted this class action for review of the administrative decision, seeking a declaration that Section 225 is unconstitutional. This is a direct appeal from an order of the three-judge district court holding Section 225 unconstitutional and enjoining its operation.

Section 225 provides that the Secretary may suspend[2] disability benefit payments to an individual if he receives information leading him to believe the individual is no longer disabled. Upon receiving such

[1] Under Section 223(d)(1) of the Social Security Act, 42 U.S.C. (Supp. V) 423(d)(1), disability is defined as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." The Act further provides that any person who is actually engaged in substantial gainful activity cannot qualify as disabled. 42 U.S.C. (Supp. V) 423(d)(4).

[2] Benefits are *suspended* by a letter so advising the beneficiary before a determination is made whether disability has ceased. Disability benefits are *terminated* for death, attainment of age

information the Secretary may proceed by instructing the local district office of the Social Security Administration to investigate further;[3] the district office may then forward the results of its investigation to the appropriate State agency for a recommendation whether suspension would be justified.[4] The State agency's recommendation is reviewed by the Social Security Administration's Bureau of Disability Insurance, which is located in Baltimore, Maryland, and if suspension is ordered, the beneficiary is promptly notified.

The appropriate State agency is also notified and termination proceedings are begun, if these have not already commenced, in order to determine whether the individual's disability has ceased. 42 U.S.C. (Supp. V) 421(a). A State agency's determination that the beneficiary is no longer disabled must be supported by specific findings and conclusions and is subject to review and reconsideration by the Bureau of Disability Insurance in Baltimore. 42 U.S.C. (Supp. V) 421(c); 20 C.F.R. 404.905(d); 20 C.F.R. 404.909. When suspension has not already been ordered, this may be done while the State agency's

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65, attainment of age 18 or 22 for benefits to dependent children, or cessation of disability. 42 U.S.C. 402(d)(1)(B), 423(a)(1)(D). Cessation of disability is demonstrable either by medical evidence or by evidence of earnings derived from substantial gainful activity.

[3] Prior to August 1970, this procedure was always followed if the information received by the Secretary consisted of wage postings. After that date, however, because of overburdened district offices, the Secretary instituted an experimental procedure whereby the recipient is notified by mail and asked to verify his earnings, explain the surroundng circumstances and visit the district office if he has any questions.

[4] The district office may instead forward the results directly to the Social Security Administration.

determination is pending for review before the Bureau of Disability Insurance if, for example, the beneficiary was currently being paid benefits although the State agency found that his disability ended more than two months earlier.

Actual benefit payments when terminated do not cease until two months after the month in which the disability is found to have ceased. 42 U.S.C. (Supp. V) 423(a)(1)(D). If benefits were previously suspended, the beneficiary is nevertheless entitled to payment for two months from the date of the cessation of his disability when termination is ordered. A beneficiary wishing to contest the decision to terminate his benefits is entitled to a *de novo* evidentiary hearing. 20 C.F.R. 404.917. If the initial agency action is reversed and reinstatement of disability benefits is ordered, corrective payments back to the date of suspension or initial termination are made.

The facts of this case are not in dispute. Radie Wright applied for and was awarded disability benefits in May 1966. In late 1968 he returned to work and continued working through December of 1969, earning a total of $4,441.81. He did not notify the Social Security Administration of his return to work.[4] In 1970 the Administration discovered that earnings had been posted to Wright's earnings record for the previous year. The Administration, through its Washington, D.C., district office, conducted an additional investigation, including a verification of the earnings and an

[4] In Item 21 of the application the claimant agreed to notify the Social Security Administration if he returned to work.

interview with Wright. The Social Security Administration's district office then forwarded this information to the Washington, D.C., Department of Vocational Rehabilitation, which determined that Wright's disability had ceased because he had demonstrated his ability to engage in substantial gainful employment.[6] The file was then forwarded to the Social Security Administration's Bureau of Disability Insurance. Acting pursuant to 42 U.S.C. 425, the Administration suspended his benefits on April 14, 1970, before making a final decision with respect to termination.[7] Wright then instituted this action, and on May 14, 1970, the district court entered a temporary restraining order requiring restoration of Wright's disability benefits.[7]

The three-judge district court held Section 225 of the Social Security Act unconstitutional because, under this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254, due process requires that a beneficiary have "an opportunity to participate in the determination proceedings prior to the suspension of benefits" (App. A 19). The court also ruled that, in the disability con-

[6] As of July 1969, Wright had exceeded the nine-month trial work period under Section 222(c), 42 U.S.C. 422(c). The Department considered August 1969 as the date Wright's disability ended.

[7] John D. Atkins, Jr., was an intervenor in the district court (App. A 16). Although his disability benefits were at one point terminated under Section 221 and then reinstated after reconsideration, his benefits were never suspended under Section 225, the section at issue in this case. He is therefore in a position no different from that of any other member of the class of persons receiving disability benefits and the particular facts relating to him are irrelevant to this case.

text, due process requires timely notice to a recipient together with an opportunity to examine documentary evidence against him and to present evidence in support of his claim. It stated that if the recipient's evidence conflicts with the evidence possessed by the Social Security Administration, this conflict should be resolved in a hearing before an impartial hearing examiner (App. A. 21). Judge Matthews, dissenting in part, stated that in addition to the procedural safeguards outlined by the majority, the beneficiary should be entitled to "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally [*Goldberg* v. *Kelly*, 397 U.S. 254, 268]" (App. A. 23).

The court's order provides for continued benefit payments to Wright and prohibits suspension of any social security disability benefits without affording the recipient adequate notice and opportunity to participate in the determination proceedings. The court subsequently stayed the part of its order that prohibited future suspension of social security disability benefits.

THE QUESTION IS SUBSTANTIAL

1. In this case the three-judge district court invalidated a significant provision of a major act of Congress. The need for this Court to determine the constitutionality of Section 225 is plain. The large number of decided and pending cases in which similar

constitutional challenges [8] have been made demonstrates the significance of the issue.[9]

2. The existing procedures under Section 225 for suspension of Social Security disability benefits payments satisfy the due process clause, since they adequately protect the recipients of those payments against arbitrary government action.

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[8] The constitutionality of Section 225 has been upheld in *Messer* v. *Finch*, 314 F. Supp. 511 (E.D. Ky.) (three-judge court), vacated and remanded for dismissal as moot, 400 U.S. 987. The right to a hearing prior to suspension or termination of disability benefits is pending in a number of other cases: *Doyle* v. *Richardson*, (C.A. 5, 31,104); *Moore* v. *Richardson*, (N.D. Calif., Civil No. C-70-2573); *Eldridge* v. *Richardson*, (W.D. Va., Civil No. 70-C-52-A); *Dye* v. *Richardson*, (W.D. Pa., Civil No. 70-1384) (dismissed March 8, 1971); *Harvey* v. *Richardson*, (W.D. Pa., Civil No. 70-1460); *Rodriquez* v. *Finch*, (D. Colo., Civil No. C-2294). The issue is also presented in several nondisability cases: *Anderson* v. *Finch*, (N.D. Ohio, Civil No. 70-425, decided January 15, 1971); *Garofalo* v. *Richardson*, (S.D. N.Y., Civil No. 70-5133); *Lindsay, et al* v. *Richardson*, (W.D. N.C., Civil No. 2794); *Van Guilder* v. *Richardson*, (D. Minn., Civil No. 4-70-386); *Hopkins* v. *Richardson*, (E.D. Pa., Civil No. 71-37); *Shisslak* v. *H.E.W.* (D. Ariz., Civil Action No. 71-35TUC); *Baker, et al* v. *Finch* (N.D. Ga., Civil No. 13786, decided December 21, 1970).

[9] The fiscal strain on the social security fund that would be imposed by the invalidation of Section 225 is significant. The Social Security Administration estimates that the cost per year of delaying all disability suspensions two months, which would be the minimum delay under the procedures imposed by the district court, would be $4,968,000. The cost of delaying all terminations of benefits pending application of the court's required procedures (a result which necessarily follows from the court's decision) would be approximately $18,212,688 per year.

Prior to the initial award of disability benefits, every claimant is advised that if his condition improves to the extent that he is no longer unable to engage in substantial gainful employment, his benefits will cease. The Secretary's decision to suspend benefits is based on objective evidence. Rumor, gossip or informers' "tips" are never the basis. Here the decision rested upon the appellee's actual earnings as reported by his employer to the Secretary. Moreover, benefits are never suspended because of earnings unless the beneficiary (or someone acting on his behalf) verifies that wages posted to his account in fact reflect his earnings.

In addition to the objective nature and high reliability of the evidence used to suspend benefits, the procedures followed afford further safeguards against an arbitrary determination.[10] The claimant is contacted regarding his continued disability. In this case, in addition, the information bearing on the question of continuing disability was assessed independently by qualified individuals at both the State agency and the Bureau of Disability Insurance. Benefits are suspended only when it appears necessary to prevent overpayment pending the final administrative determination on his continued eligibility.

3. The district court held, however, that these protections are not sufficient and that, prior to the suspension of benefits, the recipient must be afforded a hearing to resolve any conflicts in the evidence and

[10] Of 1,100 suspensions per month, only 9 percent are eventually reinstated.

must have "an opportunity to participate in the determination proceedings" (App. A 19). The latter requirement presumably relates to something other than the pre-suspension hearing.

The court's conclusion that the Due Process Clause requires such a hearing misapplies *Goldberg v. Kelly*, 397 U.S. 254. *Kelly* held that in view of the factors unique to the Aid to Families with Dependent Children ("AFDC") program, due process required the opportunity for a hearing before those benefits could be terminated. Nothing in *Kelly*, however, indicates that the same principle must be followed before Social Security disability benefits may be suspended because the recipient has had substantial earnings—and that is the only issue here involved. As appears below, there are significant reasons why the Secretary should not be required to follow the procedures prescribed in *Kelly* in dealing with the different situations here involved.

(a) The determination that the recipient has sufficient earnings to indicate that he no longer is disabled ordinarily rests upon objective evidence of the highest probative value—reports of such earnings made by the employer to the Secretary. Cf. *Richardson v. Perales*, No. 108, this Term, decided May 3, 1971, slip op. pp. 14–15. Moreover, the Secretary does not act until the nine-months' trial period of work has passed (see note 6, *supra*); the receipt of significant earnings for that time is compelling evidence that the person no longer is disabled. The decision to suspend because of substantial earnings thus turns

upon a significantly different kind of judgment than the decision to terminate welfare payments that was involved in *Kelly*.

The latter decision may result from personal and social situations brought to the attention of the authorities by tips, rumor or gossip. One of the recipients in *Kelly*, for example, had been cut off because of her alleged failure to cooperate with welfare authorities in suing her estranged husband; payments to another were terminated because of alleged drug addiction. 397 U.S. at 256, n. 2. Social security disability payments, however, are suspended only on the basis of an objective fact: that the previous disability has ceased. Where the cessation of disability is shown by the receipt of substantial earnings, the evidence is a regular report that the employer makes to the government for all his employees; its probative weight cannot be denied. Indeed, even where suspension occurs as a result of medical evidence that the disability has ceased, that determination, too, rests upon reports of medical examinations, which have long been recognized as highly reliable. *Perales, supra.*

Thus, the great risk of error and misjudgment that impelled this Court in *Kelly* to require pre-termination hearings is not present in suspensions of disability benefits based upon receipt of substantial earnings. The inherent trustworthiness of the evidence in this type of case insures fair determinations and adequately guards against the danger that any large number of eligible recipients will be improperly denied benefits until a hearing is held. Moreover, in such cases the

informal contact made with the recipient before suspension, at which he obviously has the chance to give his side of the case, provides him with adequate procedural protections.

(b) If the recipient must be permitted to participate in the determination proceedings, the adjudicative process presently followed will be considerably disrupted. Pursuant to Section 221 of the Act, 42 U.S.C. 421, as amended, 42 U.S.C. (Supp. V) 421, the Secretary has entered into agreements with each State under which a State agency, subject to review by the Secretary, makes the disability determinations in these cases. As the legislative history of the Social Security Amendments of 1954 indicates, State agencies were utilized because they had well-established relationships with the medical profession and would thereby remove the major case load from the Social Security Administration. By agreement, all State agencies apply the same standards in evaluating the severity of impairments, thereby insuring equal treatment of all disabled individuals. H. Rep. No. 1698, 83d Cong., 2d Sess., at 23–24 (1954). Under these agreements, the Secretary may reject a State agency's conclusion that disability has ceased and may require the agency to reconsider its finding in order to conform with these uniform standards.[11] Review of State agency determinations is performed by a trained Dis-

[11] The Secretary's authority to review determinations by State agencies in order to assure uniform administration was reiterated in subsequent legislative history. H. Rep. No. 2936, 84th Cong., 2d Sess., at 26 (1956).

ability Examiner at the Social Security Administration's Bureau of Disability Insurance.

Disability determinations are thus made in two steps: first by the State agency, and then by the Bureau of Disability Insurance of the Social Security Administration. Before these proceedings begin or during their course, when it appears necessary to prevent overpayment to a recipient who appears no longer disabled, the Secretary, acting through the Bureau of Disability Insurance or at the suggestion of the State agency, may suspend benefit payments under Section 225. The Social Security Administration requires a recipient, prior to suspension, to be notified in writing and asked to verify his earnings and explain the circumstances; if he has any questions, he is instructed to visit the district office.[12] A similar procedure was afforded to the plaintiff in the case.[13]

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[12] The function of the local district office is limited to that of a fact-gathering and liaison nature. This results from centralizing initial determinations, first in the State agencies and then in the Bureau of Disability Insurance in Maryland. Such an arrangement not only makes possible the necessary concentration of personnel qualified to make the specialized medical and vocational evaluations required in disability cases, but also permits the Administration to staff its numerous district offices—which exceed 700 in number—with individuals who, although trained to obtain medical and other relevant data from claimants, do not have to be qualified to make medical judgments of the sort required in an adjudication of disability.

[13] The intervenor whose benefits were terminated under 42 U.S.C. 423, rather than suspended under 42 U.S.C. 425, al-

The district court's ruling that the claimant also is entitled to "an opportunity to participate in the determination proceedings prior to the suspension of benefits" (App. A 19) would require that the beneficiary be allowed to participate in either the State agency determination proceedings or the decision of the Bureau of Disability Insurance, which is located in Baltimore, Maryland. This procedure is impractical. It either would require the claimant to travel great distances or would necessitate that state and federal officials travel to the regional area where the claimant resides. The decision-making function could not be turned over to the social security district offices without vast disruption to the present system; although located conveniently to the claimants, these offices are not staffed with individuals qualified to make the medical and vocational judgments necessary for disability determinations. Moreover, the Act confers the power to make initial determinations only on State agencies. See 42 U.S.C. 421(a). The district court's decision, therefore, would require substantial changes in the present procedures, which are designed to effectuate the statutory allocation of functions prescribed by Congress.

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though not personally interviewed prior to the formal notice of termination, did have the advantage of the two month grace period provided in 42 U.S.C. 423(a)(1)(D). Such time afforded him the opportunity to submit evidence that nothwithstanding the initial determination of the Secretary he remained disabled, and thus made possible the correction of an erroneous termination without interrupting his benefit payments.

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CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

L. PATRICK GRAY, III,
Assistant Attorney General.

KATHRYN H. BALDWIN,
PATRICIA S. BAPTISTE,
Attorneys.

WILMOT R. HASTINGS,
General Counsel,

EDWIN H. YOURMAN,
Assistant General Counsel,

PAUL MERLIN,
Attorney,
Department of Health, Education and Welfare.

MAY 1971.

APPENDIX A

United States District Court for the District of Columbia

(Civil Action No. 1457-70)

RADIE WRIGHT, ET AL., PLAINTIFFS

v.

ROBERT H. FINCH, DEFENDANT

Before ROBB, Circuit Judge, MATTHEWS, Senior District Judge, and GASCH, District Judge.

GASCH, District Judge: This class action [1] was initiated by plaintiff Radie Wright in behalf of all recipients of disability insurance benefits under Title II of the Social Security Act.[2] Radie Wright suffers from chronic gastritis, cirrhosis of the liver, hepatic decompensation arthritis and a heart condition. He was advised by his doctors that he could no longer work as a laborer because of his condition and his application for disability payments was approved by the Social Security Administration in May, 1968. Since that time he has drawn various amounts for his support and the support of his wife and two sons; his current payments are $126.70 per month for his own support plus smaller amounts for the support of his sons. In 1968, while still drawing benefit pay-

[1] The situation presented here meets the criterion of a class action maintainable under Rule 23(b)(2), Fed. R. Civ. P.

[2] 42 U.S.C. §§ 401 *et seq.* (1964).

ments, he returned to work and earned $343.32; he continued to work in 1969 and earned $4,098.49. He has not worked since December, 1969. The Administration checks earnings postings against the rolls of disability beneficiaries. This check revealed that Radie Wright had been employed. Following additional field investigation, including verification of the earnings with the employers and an interview with plaintiff, the Administration determined that because he had demonstrated ability to engage in substantial gainful activity that Radie Wright might no longer be eligible for disability payments. He was notified by letter on April 14, 1970, that his payments were being suspended as of that time pending further investigation of his eligibility.[3]

Intervenor-plaintiff, John D. Atkins, Jr., is currently a psychiatric patient of the Veterans Administration Hospital in Salem, Virginia. He has been under psychiatric care since December, 1966, and was found eligible for disability benefits by the Administration in July, 1967. He was informed by letter on February 3, 1970, that it had been determined that his disability had ceased as of January, 1970, apparently on the basis of an examination of the recipient and his medical records conducted by a doctor for the Social Security Administration in January, 1970. His benefits were to be terminated after the March, 1970, payment. This decision was subsequently reconsidered and Atkins was reinstated by the Administration. He is still subject to the suspension provisions of the Act.

Plaintiffs contend that section 225 of the Act[4] is unconstitutional in that it deprives them of property

[3] The notice given plaintiff was a form notice which explained that his benefit payments had been stopped because "your trial work period expired."

[4] *Id.*, § 425.

without due process of law.[6] That section of the Act provides:

> If the Secretary, on the basis of information obtained by or submitted to him, believes that an individual entitled to [disability] benefits . . . may have ceased to be under a disability, the Secretary may suspend the payment of benefits . . . until it is determined . . . whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased.

In its recent decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), the Supreme Court held that an evidentiary hearing was required prior to terminating welfare benefits under Title IV of the Act. The challenged section quoted above must similarly be held constitutionally deficient in that disability payments may be suspended without prior proceedings in which the recipient may participate.

I.

In *Goldberg* and the companion case of *Wheeler* v. *Montgomery*,[8] the Supreme Court has declared that benefits received under Title I (Old Age Assistance) and Title IV (Aid to Families with Dependent Children) of the Social Security Act are a matter of statutory entitlement for persons qualified to receive them.[7] Therefore, suspension or termination of these benefits are subject to the requirements of procedural

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[6] Since plaintiffs seek an injunction restraining the enforcement of an act of Congress due to an alleged constitutional defect, a three-judge court was convened pursuant to 28 U.S.C. §§ 2282, 2284 (1964).

[8] 397 U.S. 280 (1970).

[7] 397 U.S. 262.

due process. There is no significant difference between entitlement to those benefits and benefits under Title II (Old Age, Survivors and Disability Insurance Benefits).[8] It follows that disability beneficiaries must be accorded procedural due process in suspension and termination proceedings.[9]

II.

The exact procedures demanded by due process are determined by the circumstances of the particular situation. The determination of the appropriateness of the procedures requires balancing the governmental function involved against the private interest affected.[10] The Court stated the test in *Goldberg*: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[11] In *Goldberg*, the crucial factor was that "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live

[8] Eligibility for Title I and Title IV benefits is based on the need of the recipient whereas Title II benefits are paid to individuals who are insured under the Act and meet the age or disability requirements. 42 U.S.C. §§ 402, 423 (1964). This distinction is not significant in determining the procedural rights of the recipient. *See* text accompanying note 12, *infra*.

[9] *See Flemming v. Nestor*, 363 U.S. 603 (1960). "The interest of a covered employee under the [Social Security Act] is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Id.*, at 611.

[10] *See, e.g., Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961).

[11] 397 U.S. 262–63 (citations omitted).

while he waits." This factor may not be as great in the case of a disability beneficiary as it is in the welfare recipient's situation. Disability beneficiaries are not, as are welfare recipients, dependent by definition on benefit payments for their livelihood. But a disability beneficiary is by definition unable to engage in substantial gainful activity and he would, therefore, be liable to sustain grievous loss while awaiting the resolution of his claim.

The countervailing governmental interests raised in support of the summary procedures are the protection of the Federal Disability Trust Fund from depletion due to payments to ineligible recipients pending determination of their status and the administrative expense involved in providing pre-termination review. These fiscal and administrative expenses to the government, whatever their magnitude, are insufficient justification considering the crippling blow that could be dealt to an individual in these circumstances. It is precisely this type of balance which led the *Goldberg* Court to require pre-termination review.

The ex-parte suspension power granted to the Secretary by section 225 is summary adjudication that is inconsistent with the requirements of due process. A disability beneficiary must be given adequate notice and an opportunity to participate in the determination proceedings prior to the suspension of benefits.

III.

The Supreme Court concluded that a "fair hearing" for welfare recipients must include timely and adequate notice, an opportunity for the recipient to present his case orally and the right to confront and cross-examine adverse witnesses. In determining the

[12] *Id.*, at 264.

type of hearing necessary, the Court relied on its previous holding in *Greene* v. *McElroy*.[13]

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact finding, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, *it is even more important where evidence consists of the testimony of individuals whose memory might be faulty or who in fact, might be perjurors or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.* We have formalized these protections in the requirements of confrontation and cross-examination.[14]

The evidentiary basis for the determination of eligibility for welfare benefits which was considered by the Court in *Goldberg* in delineating the form of hearing required in that case differs from the situation presented here. The regulations[15] of the Social Security Administration provide that disability benefits can be terminated when medical or other evidence indicates that the impairment has ceased or when the individual has engaged in substantial gainful employment. The evidence to support these findings consists of medical reports and certification by employers

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[13] 360 U.S. 474 (1957).

[14] *Id.*, at 496 (emphasis added).

[15] 20 C.F.R. § 404.1539.

that the individual has been employed by them." If timely notice is given the recipient specifying the grounds for his proposed suspension and he is given reasonable opportunity to examine the documentary evidence supporting the action, there would be no necessity to hold a formal hearing where the medical personnel or the employers would have to be made available for cross-examination. The affected recipient should of course be given the opportunity to respond and submit evidence supporting his claim. The resolution of conflicting evidence at this point should be made by an impartial decision maker.[17] If the recipient has submitted some evidence that contradicts that possessed by the Administration, a hearing could be held to resolve those issues. The Social Security Administration should have an opportunity to develop presuspension proceedings[18] which afford

[16] The Bureau of Data Processing and Accounts of the Social Security Administration which maintains earnings records of all individuals covered under the Act, checks earnings posted against the rolls of disability beneficiaries. The Administration's Claims Manual instructs field personnel to contact employers for whom the disability beneficiary has worked while receiving benefits. Further, section 6708 of the Manual states that "benefits should not be suspended based solely on a report from an informant."

[17] The investigating officer who has compiled the record on which the decision is to be based should not make the final decision.

[18] The Secretary has formulated procedures for determining and reviewing rights with respect to the establishment and continuance of a period of disability. 20 C.F.R. Part 404, subpart J. These review procedures only become applicable after the administrative decision that the disability has ceased, 20 C.F.R. § 404.905(d), but could form a basis for the presus-

fundamental due process to the recipient before this Court rules on the adequacy of the details of that procedure."

I am authorized to state that Circuit Judge Robb concurs in this opinion.

OLIVER GASCH,
Judge.

JANUARY 6, 1971.

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pension proceedings which this decision requires. These regulations require that when an initial determination is made that the party to whom the determination applies be notified of the determination, of the basis of the determination, and informed of his right to request reconsideration. 20 C.F.R. § 404.907. The party may submit additional material for the purposes of the reconsideration. After initial determination and reconsideration, the individual has a right to a hearing before an impartial hearing examiner. 20 C.F.R. § 404.916. These regulations do not now apply to actions under 42 U.S.C. § 425, since suspension of benefits pending an investigation of continued eligibility is not an initial determination under the regulations. 20 C.F.R. § 404.906.

"The Supreme Court in *Goldberg* recognised "the importance of not imposing upon the . . . government . . . any procedural requirements beyond those demanded by rudimentary due process." 397 U.S. at 267. *See also* the dissenting opinion of Mr. Chief Justice Burger in *Wheeler* v. *Montgomery*, 397 U.S. 283 (1970).

MATTHEWS, Senior District Judge (concurring and dissenting in part): I concur in large part in the opinion, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970; *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970). In *Goldberg* the Supreme Court held that a welfare recipient, in addition to timely and adequate notice detailing the reasons for a proposed termination of benefits, must have "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." Page 268. I respectfully dissent from so much of the opinion as seems to suggest that the procedural requirements of due process may be satisfied with something less than the "opportunity" specified in *Goldberg*.

BURNITA SHELTON MATTHEWS,
United States Senior District Judge.

APPENDIX B

United States District Court for the District of Columbia

(Civil Action No. 1457–70)

RADIE WRIGHT, ET AL., PLAINTIFFS

v.

ROBERT H. FINCH, DEFENDANT.

ORDER

Pursuant to the opinion filed in this case on January 6, 1971, which opinion is adopted as the Court's Findings of Fact and Conclusions of Law, it is by the Court this 12th day of February, 1971,

ORDERED that Section 225 of the Social Security Act be and it is hereby declared unconstitutional and void in that it denies recipients procedural due process in suspension proceedings, and it is further

ORDERED that plaintiff Radie Wright continue to receive Social Security Disability benefits until such time as his eligibility is suspended in accordance with the procedures outlined in the Opinion of January 6, 1971, and it is further

ORDERED that no Social Security Disability beneficiary be suspended without being afforded adequate notice and an opportunity to participate in the determination proceedings, and it is further

ORDERED that the Social Security Administration promulgate regulations governing the suspension of disability benefits to recipients which shall conform

to the requisites of procedural due process as outlined in the Opinion filed in this case, and it is further

ORDERED that plaintiffs' motion for summary judgment be and it is hereby granted to the extent reflected by the foregoing orders, and it is further

ORDERED that defendant's motion for summary judgment be and it is hereby denied.

OLIVER GASCH,
Judge.

APPENDIX C

United States District Court for the District of Columbia

(C.A. No. 1457-70)

RADIE WRIGHT, ET AL., PLAINTIFFS

v.

ROBERT H. FINCH, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1253, from the order of this Court entered February 12, 1971, in favor of the plaintiffs and against the defendant.

THOMAS A. FLANNERY,
United States Attorney.
JOHN A. TERRY,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing notice of appeal has been mailed to counsel for plaintiffs, E. Calvin Golumbic, Esquire, 36 N Street, S.E., Washington, D.C. 20003, this 12th day of March, 1971.

JOHN A. TERRY,
Assistant United States Attorney.

to the requisites of procedural due process as outlined in the Opinion filed in this case, and it is further

ORDERED that plaintiffs' motion for summary judgment be and it is hereby granted to the extent reflected by the foregoing orders, and it is further

ORDERED that defendant's motion for summary judgment be and it is hereby denied.

OLIVER GASCH
Judge.

APPENDIX D

STATUTES INVOLVED

42 U.S.C. (Supp. V) 425 provides in pertinent part:

> If the Secretary [of Health, Education and Welfare], on the basis of information obtained by or submitted to him, believes that an individual entitled to [disability insurance] benefits under section 423 of this title * * * may have ceased to be under a disability, the Secretary may suspend the payment of benefits under such section * * * 423 of this title until it is determined (as provided in section 421 of this title) whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased. * * *

20 C.F.R. 404.1521 provides:

> *Initial determinations as to entitlement or termination of entitlement.*—After any determination as to whether an individual * * * has ceased to be under a disability, the Administration will make an initial determination * * * with respect to entitlement * * * to disability insurance benefits * * *.

20 C.F.R. 404.905(d) provides:

> *Termination of monthly benefits or periods of disability.*—The Administration (or, in a disability claim, a State agency when required by a Federal-State agreement pursuant to section 221(b) of the Act) shall, with respect to a

party who has been determined to be entitled to monthly benefits or a period of disability, make findings, setting forth the pertinent facts and conclusions, and an initial determination as to whether, under the applicable provisions of title II of the Act, such party's entitlement to monthly benefits, or a period of disability, has ended and, if so, the last month of such entitlement or * * * disability. Such findings of fact and determination shall be made whenever it appears to the Administration that such party's entitlement to monthly benefits, or a period of disability has ended. * * *

20 C.F.R. 404.906 provides in part:

Administrative actions which are not initial determinations.—(b) The suspension of benefits pursuant to section 225 of the Act pending investigation and determination as to the cessation of the disability * * * benefits under section 202(d) or 223 of the Act.

20 C.F.R. 404.908 provides:

Effect of Initial determination.—The initial determination shall be final and binding upon the party or parties to such determination unless it is reconsidered * * * or it is revised * * *.

20 C.F.R. 404.917 provides in part:

Hearing; Right to hearing.—An individual has a right to a hearing about any matter designated in § 404.905 if: (a) An initial determination and a reconsideration of the initial determination have been made by the Administration * * *.

20 C.F.R. 404.1539 provides in part:

> *Cessation of disability.*—Where it has been determined that an individual is under a disability as defined in § 404.1501, the "disability" shall be found to have ceased:
>
> (a) In the case of an individual entitled to disability insurance benefits or child's insurance benefits based on disability, in the earlier of the following:
>
> (1) The month in which the impairment, as established by the medical or other evidence, is no longer of such severity as to prevent him from engaging in any substantial gainful activity * * * or
>
> (2) The month in which the individual has regained his ability to engage in substantial gainful activity * * * as demonstrated by work activity after * * * [a period of trial work] * * *.